

- (1) What, if any, is the extent of claimant's injury and/or disability?
- (2) Is claimant entitled to a twenty-six (26) week deduction from the temporary total disability compensation paid during vocational rehabilitation?
- (3) Is claimant entitled to future medical?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The parties stipulated at oral argument that the issue regarding the unauthorized medical allowance for the examination by Dr. C. Reiff Brown has been resolved and will not be an issue before the Appeals Board.

Claimant, an employee of respondent, was working in Mitchell County, Kansas when, on January 9, 1991, he fell from a roof suffering significant injury to his right foot and ankle. As a result of the fracture suffered by claimant, he was initially treated by Dr. David L. Black and Dr. Terrance C. Tisdale of Hutchinson, Kansas. When conservative treatment failed, claimant was referred to Dr. Steven J. Howell and, on May 24, 1993, underwent a bone block and distraction arthrodesis with decompression of the lateral wall of the calcaneus, with a bone graft borrowed from the iliac crest. The surgery, also known as a fusion, improved claimant's condition but claimant continues to have symptoms in both the foot and ankle including pain, swelling, weakness in the foot and leg and limited range of motion.

While medical reports of Dr. Black, Dr. Tisdale and Dr. Howell are all contained as exhibits in the deposition of Dr. C. Reiff Brown, none of the treating doctors was deposed in this matter.

The only medical testimony provided for review stems from the independent examination performed on claimant by Dr. Brown on February 22, 1994. Dr. Brown found claimant had suffered a commuted fracture of the right subtalar joints and had undergone a successful fusion. The residual complications involved claimant's foot and ankle as above specified. Dr. Brown assessed claimant a twenty-two percent (22%) permanent impairment of function to the right leg as a result of claimant's loss of motion of the foot and ankle.

When fusing joints, doctors typically borrow bones from the iliac crest, located in the hip, and use the bones so borrowed to assist in the fusion of the involved joint. This procedure was followed in this instance and a bone was borrowed from claimant's iliac crest and used in fusing the ankle. Claimant contends the invasion of claimant's body at the hip site expands the scheduled injury to claimant's right foot and ankle to a whole body impairment and allows for an award of work disability. In so arguing, claimant cites Bryant v. Excel Corp., 239 Kan. 688, 722 P.2d 579 (1986), as controlling. In Bryant, claimant suffered injury to her left wrist and elbow resulting in shooting pain and numbness into her left armpit and shoulder. The Court, in awarding a whole body impairment, found that the situs of the disability rather than the situs of the trauma, controlled. Claimant further cites Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976), as supportive. In Chinn, claimant underwent knee surgery which resulted in an altered gait. This altered gait increased claimant's difficulties and led to low back pain. In granting a whole body impairment, the Court again found that the situs of the disability rather than the situs of the trauma, controlled.

Respondent contends this matter is controlled by Fogle v. Sedgwick County, 235 Kan. 386, 680 P.2d 287 (1984), wherein the claimant suffered injury to his eighth (8th) cervical, first (1st) thoracic nerve root in the spine with the resulting physical manifestation

appearing only in claimant's loss of use of his left arm. In using the same logic as found in Bryant, the Court held the situs of the disability rather than the situs of the trauma controlled, thus awarding claimant, in Fogle, a scheduled injury only, even though the specific trauma was to claimant's spine.

Two cases very much on point also cited by the parties are Quinones v. MBPXL Corp., 10 Kan. App. 2d 284, 697 P.2d 891 (1985), and Rodriguez v. Henkle Drilling & Supply Co., 16 Kan. App. 2d 728, 828 P.2d 1335 (1992). In Quinones, claimant sustained injury to his right arm and, in the course of treatment, a nerve was transplanted from his left leg. It was found that the transplant of the nerve resulted in an area devoid of feeling which had a direct effect on claimant's ability to be employable since he was left without the ability to feel cold, heat or any sensation of pain in that area. Claimant was granted a whole body impairment as a result of the involvement of the donor site. In Rodriguez, a similar injury to claimant's left forearm resulted in a fracture. The fracture was reduced with a bone graft borrowed from claimant's left hip. In Rodriguez, it was found that claimant suffered no physical restrictions to the hip and the slight discomfort at the donor site, experienced by claimant when wearing tight underwear and a belt, resulted in no loss of impairment or permanent injury to claimant.

In the present case, claimant contends involvement of the iliac crest donor site grants him entitlement to a whole body award. In reviewing the medical evidence of Dr. Brown, it is clear claimant has little or no difficulty from the surgery performed at the iliac crest site. The only symptomatology experienced by claimant was a slight numbness over the surgical site with no additional complaints related by claimant to any of the doctors. Review of the medical records in the deposition of Dr. Brown contained no mention by claimant of any difficulties as a result of this surgery with the exception of the difficulties experienced to his foot and ankle.

In workers compensation matters, it is the burden of claimant to establish claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g); Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The medical evidence is consistent in finding claimant suffered no impairment as a result of the removal of the bone from claimant's iliac crest. The restrictions placed upon claimant by Dr. Brown relate solely to claimant's lower extremity. Claimant has suffered no disability or reduction in ability to perform work nor any loss of physiological capabilities to his hip as a result of this surgery.

The Appeals Board finds that the testimony of Dr. Brown is persuasive and claimant is granted impairment to the right foot and ankle as a result of the injuries suffered on January 9, 1991.

K.S.A. 1990 Supp. 44-510e(a) defines functional impairment as follows:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

The only medical evidence assessing claimant functional impairment in this case, is that of Dr. Brown who assessed claimant a twenty-two percent (22%) permanent

impairment of function of the right lower leg as a result of the injuries suffered on January 9, 1991. The Appeals Board finds the medical of Dr. Brown to be persuasive and awards claimant a twenty-two percent (22%) permanent partial impairment of function to the right lower extremity as a result of the injuries incurred on January 9, 1991.

Claimant further contends that if this matter is a scheduled injury, the Administrative Law Judge erred in failing to deduct twenty-six (26) weeks temporary total disability compensation from the total credited to respondent pursuant to K.S.A. 1990 Supp. 44-510g(g) which states in part:

“Subject to a maximum of 26 weeks, the number of weeks during which temporary total disability compensation is paid during vocational rehabilitation, reeducation or training shall not be deducted from the maximum number of weeks available for the payment of disability compensation under the schedule provided in K.S.A. 44-510d and amendments thereto.”

Per the language of K.S.A. 1990 Supp. 44-510g(g), which appears to be clear and unambiguous, the Appeals Board finds the Administrative Law Judge erred in failing to deduct twenty-six (26) weeks from the total temporary total disability compensation paid in this matter prior to rendering the award.

The Appeals Board further finds claimant is entitled to future medical expense upon proper application to and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson should be, and is hereby, modified and the claimant, Kim Holland, is granted an award against the respondent, Independent Steel Siding, Inc., and Travelers Insurance Company, for an injury occurring on January 9, 1991, for a 22% permanent partial impairment of function to the right lower extremity.

The compensable weeks are computed as follows:

190 weeks [lower leg maximum per K.S.A. 44-510d(a)(15)] minus 85 weeks temporary total disability compensation (111 weeks paid minus 26 weeks credit) equals 105 weeks times 22% equals 23.1 weeks permanent partial functional disability.

Claimant is entitled to 111 weeks temporary total disability compensation at the rate of \$254.79 per week totalling \$28,281.69, followed by 23.1 weeks permanent partial functional disability at the rate of \$254.79 per week totalling \$5,885.65, for a total award of \$34,167.34, all of which is due and owing at the time of this Award, minus any amounts previously paid.

The Appeals Board further finds claimant is entitled to future medical expense upon proper application to and approval by the Director.

Claimant is further entitled to unauthorized medical expense up to and including \$350.00 on presentation of an itemized statement verifying same.

Claimant's attorney fee contract is approved insofar as it is not in contravention of K.S.A. 44-536.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

OWENS, BRAKE & ASSOCIATES	
Preliminary Hearing Transcript	\$124.21
Dated July 22, 1992	
 Regular Hearing Transcript	\$269.72
Dated May 12, 1994	
TOTAL	\$393.93
 PATTY L. MORTON, C.S.R.	
Deposition of Dr. C. Reiff Brown	\$137.60
Dated May 23, 1994	
 KELLEY, YORK & ASSOCIATES, LTD.	
Deposition of Jerry D. Hardin	\$402.87
Dated May 24, 1994	
 LORI A. PRATER, C.S.R.	
Deposition of Karen Crist Terrill	\$163.82
Dated July 8, 1994	

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

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c: James S. Oswalt, Hutchinson, Kansas
C. Stanley Nelson, Salina, Kansas
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director